

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF  
WENATCHEE-CHIWAWA IRRIGATION  
DISTRICT,

Appellant,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 85-215

ORDER ON MOTIONS  
FOR SUMMARY JUDGMENT

THIS MATTER came before the Pollution Control Hearings Board on cross motions for summary judgment. Memoranda, affidavits and exhibits were received. The Board heard oral argument on the motions at Seattle, Washington, on February 14, 1986.

T.W. Small, Jr., attorney at law, represented the appellant Wenatchee-Chiwawa Irrigation District. Allen T. Miller, Jr., Assistant Attorney General, represented the respondent Department of Ecology.

1 I. THE RECORD

2 The following written materials were considered by the Board in  
3 deciding these motions

4 1. Memorandum of Authorities of Department of Ecology in Support  
5 of Motion for Summary Judgment.

6 2. Affidavit of John Easterbrooks, dated December 9, 1985.

7 3. Affidavit of Robert Barwin, dated December 12, 1985.

8 4. Affidavit of Eugene F. Wallace, dated December 12, 1985, with  
9 exhibits attached:

10 Ex. 1 - Application to Appropriate Public Waters, filed by  
11 Wenatchee-Chiwawa Irrigation District on 3/7/83.

12 Ex. 2 - Permit to Appropriate Public Waters, issued to  
13 Wenatchee-Chiwawa Irrigation District on 1/30/84.

14 Ex. 3 - Certificate of Water Right No. 54-28160C, issued to  
15 Wenatchee-Chiwawa Irrigation District on 9/27/84.

16 Ex. 4 - Public Statement of Department of Fisheries at  
17 Wenatchee Instream Flow Adoption Hearing, 1/12/83.

18 Ex. 5 - Department of Game letter to Director, Department of  
19 Ecology, dated 1/11/83.

20 Ex. 6 - Statement of Director of Department of Ecology at the  
21 Adoption Proceeding for Wenatchee River Basin Resources  
22 Protection Program, 2/15/83.

23 5. Districts' Memorandum in Support of its Motion for Summary  
24 Judgment and Dismissal with attachments:

25 (a) Memorandum dated 5/26/83, Slattery and Berg to Hambrock

26 (b) Chapter 435, Laws of 1985, including Governor's message  
27 of partial veto.

6. Affidavit of Darrel D. Shiley, dated 1/17/86, with exhibits  
attached:

1 Ex. A - Letter dated 12/1/82, Monroe to Shiley.

2 Ex. B - Letter dated 10/26/83, Johnson to Shiley.

3 Ex. C - Letter dated 8/9/85, Clausing to Wenatchee-Chiwawa  
4 Irrigation District.

5 Ex. D - Water Right Claims filed by Wenatchee-Chiwawa  
6 Irrigation District, on 8/23/85 showing Registration No. 200,  
7 111.

8 Ex. E - Certification of Water Right Claim of Wenatchee  
9 Chiwawa Irrigation District by Pollution Control Hearings  
10 Board, dated 9/9/85.

11 Ex. F - Memorandum dated 5/26/83, Slattery and Berry to  
12 Hembrock.

13 7. Department of Ecology's Memorandum in Response to the  
14 District's Motion for Summary Judgment and Dismissal.

15 8. Affidavit of Allen T. Miller, Jr., dated 2/11/86, with  
16 exhibits attached:

17 Ex. 1 - Report of Substitute Senate Bill 4424 as passed by  
18 the Senate and considered by the House Agriculture Committee.

19 Ex. 2 - Transcript of Senate regarding SSB 4424, 3/11/85.

20 Ex. 3 - Page 545, Senate Journal, 3/11/85.

21 Ex. 4 - Transcript of Hearing before House Agriculture  
22 Committee, on SSB 4424, 4/2/85.

23 Ex. 5 - Digest of House Agriculture Committee amendment to  
24 SSB 4424, 4/2/85.

25 Ex. 6 - House Report, SSB 4424.

26 Ex. 7 - Pp. 1996-1997, House Journal, 4/26/85.

27 Ex. 8 - Transcript of Senate regarding SSB 4424, 4/27/85.

Ex. 9 - Pp. 2325-2326, Senate Journal 4/27/85.

Ex. 10 - Final Bill Report, SSB 4424.

1 9. Affidavit of Doug Clausing, dated 1/27/86, with exhibits  
2 attached;

3 Ex. 1 - Map showing location of Wenatchee-Chiwawa Irrigation  
4 District.

5 Ex. 2 - Leavenworth Echo article, 9/25/80, regarding public  
6 meeting on Wenatchee instream flows to be held 9/30/80.

7 Ex. 3 - Wenatchee World article, 9/29/80, regarding public  
8 meeting on Wenatchee instream flows to be held 9/30/80.

9 Ex. 4 - Agenda for 9/30/80 meeting in Leavenworth on  
10 Wenatchee River Basin Instream Resources Protection Program.

11 Ex. 5 - Notice to Residents, Agencies and Water Users in the  
12 Wenatchee Basin, dated 8/12/80, announcing 9/30/80 public  
meeting on Wenatchee instream flows.

3 Ex. 6 - Public Notice of hearings on draft Wenatchee River  
4 Basin Instream Resources Protection Program to be held  
5 10/25/82 in Leavenworth and Wenatchee.

6 Ex. 7 - Insertion Order for Public Notice calling for  
7 publication in Wenatchee World on 10/4/82; 10/11/82; and  
8 10/18/82.

9 Ex. 8 - Insertion Order for Public Notice calling for  
10 publication in Leavenworth Echo on 9/30/82, 10/7/82; and  
11 10/14/82.

12 Ex. 9 - Memorandum dated 9/15/82 announcing draft regulation  
and public hearings on 10/25/82 regarding Wenatchee Instream  
Resources Protection Program.

3 Ex. 10 - Wenatchee World article, 10/26/82, concerning public  
4 hearings on 10/25/82.

5 10. Affidavit of Terrence M. McCauley, dated 2/14/86.

### 6 III. UNDISPUTED FACTS

7 1. The District has for many years diverted water from the  
8 Chiwawa River several miles upstream from its confluence with the  
9 Wenatchee River near Plain, Washington. The water diverted is used  
10

1 | beneficially for irrigation and stockwatering within the district.  
2 | Return flows are directly to the Wenatchee River.

3 |       2. The District claims to have been using the water it diverts  
4 | continuously and uninterrupted during each irrigation season since  
5 | 1911. The claimed maximum rate of withdrawal is 33.3 cfs, limited in  
6 | quantity to 4,725 acre-feet per year for the present irrigation of  
7 | 1,350 acres.

8 |       3. Pursuant to Chapter 435, Laws of 1985, the District filed with  
9 | the Pollution Control Hearings Board a written statement of claim for  
10 | the uses, quantity and priority of use stated in paragraph 2 on  
11 | August 23, 1985. On September 9, 1985, the Board issued its  
12 | certification of this claim to the Department of Ecology. The  
13 | Department, thereupon, registered the claim, assigning it Registration  
14 | No. 200,111.

15 |       4. On June 3, 1983, the Department of Ecology filed with the Code  
16 | Reviser its adopted regulation for the Instream Resources Protection  
17 | Program - Wenatchee River Basin, Water Resource Inventory Area (WRIA)  
18 | 45, Chapter 173-545 WAC. The regulation established instream flows<sup>1</sup>  
19 | for the Wenatchee River Basin effective thirty days from the date of  
20 | its filing. RCW 34.04.040(2). These flows are instantaneous stream  
21 | discharges in cubic feet per second specified for various times of the  
22 | year, as measured at designated gaging stations. One such station is  
23 | \_\_\_\_\_

24 | 1. The terms "instream flows" and "minimum flows" are used  
25 | interchangeably in this Order.

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1 at Plain and is located below the confluence of the Chiwawa River with  
2 the Wenatchee River, but above the place on the Wenatchee where the  
3 District's return flows enter the river.

4 5. During the years of the initial statutory registration period  
5 ending June 30, 1974, the District did not file a claim of right to  
6 divert water from the Chiwawa. When the registration period was  
7 reopened for four months in 1979 the District again failed to file a  
8 claim.

9 6. The Department can find no record of a water right permit or  
10 certificate issued by it or one of its predecessors to the District  
11 prior to January 30, 1984. On that date the agency issued to the  
12 District a permit for use of waters of the Chiwawa River, authorizing  
13 an appropriation of 33.3 cfs limited to 4,725 acre feet per year for  
14 irrigation of 1,350 acres within the District. This permit, No.  
15 S4-28160P, states a priority date of March 7, 1983, and expressly  
16 makes the diversion it authorizes subject to the instream flows  
17 established for the gage at Plain.

18 A certificate of water right evidencing perfection of the  
19 permitted appropriation was issued to the District by the Department  
20 on September 27, 1984. This certificate, No. S4-28160C sets forth the  
21 same 1983 priority and is likewise expressly conditioned by the  
22 instream flows measured at Plain.

23 7. On September 25, 1985, the flows of the Wenatchee River as  
24 measured at the gaging station at Plain were 355 cfs. The minimum  
25 flow established by WAC 173-545-030 for that date at that point is

1 593 cfs.

2 8. On September 27, 1985, the Department issued the District on  
3 Order (No. DE 85-274) requiring the District to

4 cease and desist from further diversion of  
5 water from the Chiwawa River at any time such  
6 diversion is not in compliance with the terms  
of Certificate of Water Right No. 54-28160C or  
unless later authorized by the department.

7 9. The Order was made effective on October 2, 1985. It recited  
8 the facts of stream flow at Plain and referred to the condition making  
9 the District's use under its Certificate subject to the instream flows  
10 established by Chapter 173-545 WAC. It then stated the following:

11 In accordance with Substitute Senate Bill  
12 (SSB) 4424, Chapter 435, laws of 1985 any  
13 claim to the use of public waters accepted and  
14 certified pursuant to SSB 4424 shall not  
affect or impair in any respect whatsoever any  
water right existing prior to the effective  
date of SSB 4424 which is July 28, 1985.

15 The minimum flows set in Water Right  
16 Certificate No. S4-28160C and contained in WAC  
173-545 constitute a water right.

17 The diversion of water by the  
18 Wenatchee-Chiwawa Irrigation District from the  
19 Chiwawa River constitutes an impairment of the  
20 above described instream right when the  
streamflow in the Wenatchee River as measured  
at the Plain gage (station 12.4570.00) falls  
below the minimum flows established for  
station 12.4570.00.

21  
22 10. This District timely appealed the Department's Order to this  
23 Board on October 28, 1985.

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1 IV. ISSUES PRESENTED

2 The overarching issue presented on this appeal is whether the  
3 Department's Order to the District is valid. Various approaches to  
4 this question have been formulated and argued by the parties.  
5 However, we conclude that the matter can be resolved by examining  
6 solely the effect of the District's water right claim, on the  
7 applicability of the instream flows established by regulation.

8 Because of the approach we have taken we are not obliged to  
9 consider:

10 1) Whether the instream flows established for the Wenatchee River  
1 at Plain were established on improper procedure and are therefore  
2 invalid, as applied to the District; or

3 2) Whether over-riding considerations of the public interest exist  
4 which make application of the instream flows to the District improper.

5 We are, however, obliged to take up the preliminary question of  
6 our jurisdiction to entertain this case at all.

7 V. CONCLUSIONS OF LAW

8 A. JURISDICTION

9 We conclude that that Board has jurisdiction over this appeal.  
10 The plain language of RCW 43.21B.110 in the statutory chapter which  
1 created the Pollution Control Hearings Board gives it authority to  
2 hear appeals from orders issued by the Department of Ecology with  
3 respect to violations of any of the laws or regulations the Department  
4 administers. The Order in question, No. DE 85-274, indisputably falls  
5 within this category.



1 Whether the appeal provisions of earlier statutes applying to  
2 predecessor agencies of the Department of Ecology have any continuing  
3 vitality we need not decide. Such earlier procedural provisions have,  
4 at the minimum, been supplemented by chapter 43.21B RCW. The instant  
5 appeal was brought pursuant to the latter statute.

6 Thus, whether jurisdiction might exist concurrently in some other  
7 forum is not relevant here. The unmistakable purpose of chapter  
8 43.21B RCW was to give this Board the power, as an independent agency,  
9 to review the permit decisions and regulatory orders issued by the  
10 Department. See ITT Rayonier v. Hill, 78 Wn.2d 700, 478 P.2d 729  
11 (1970); Martin Marietta v. Woodward, 84 Wn.2d 329, 525 P.2d 247  
12 (1974); Seattle v. Department of Ecology, 37 Wn.App. 819, 683 P.2d 244  
13 (1984); See also, Shuh v. Department of Ecology, 100 Wn.2d 180, 667  
14 P.2d 64 (1983); Jensen v. Department of Ecology, 102 Wn.2d 109, 685  
15 P.2d 1068 (1984).

16 B. EFFECT OF 1985 WATER RIGHT CLAIM

17 1. The Surface Water Code of 1917 and the Ground Water Code of  
18 1945 established statutory permit systems for the acquisition of water  
19 rights in this state, based on the principle of priority.

20 Chapter 90.14 RCW, as amended in 1969, provided a five-year period  
21 for the registration of water right claims, terminating on June 30,  
22 1974. The registration program served to identify the extent of  
23 claims to water rights originating from uses prior to the water codes  
24 and to eliminate unused pre-code rights which were not claimed. See  
25 Department of Ecology v. Adsit, 103 Wn.2d 698, 694 P.2d 1065 (1985).

1 2. In 1979 the claim period was re-opened by the Legislature for  
2 a period of four months, subject to a certification procedure run  
3 through the Pollution Control Hearings Board. Section 4, chapter 216,  
4 Laws of 1979, ex. sess.

5 3. Subsequently in 1985, the claim period was again re-opened,  
6 this time for a period of one month, subject to the same PCHB  
7 certification. Section 1, chapter 435, Laws of 1985. This second  
8 re-opening of the claim period was, however, conditioned by the  
9 following:

0 The provisions of this 1985 amendatory act  
-1 authorizing the acceptance of a petition for  
-2 certification filed during the period beginning on  
-3 the effective date of this 1985 amendatory act  
-4 [July 28, 1985] and ending on midnight, September  
-5 1, 1985, shall not affect or impair in any respect  
-6 whatsoever any water right existing prior to the  
-7 effective date of this 1985 act. (emphasis added).

-8 Section 2, chapter 435, Laws of 1985 (hereafter referred to as Section  
-9 2).

7 4. The regulatory order at issue here (No. DE 85-274) is based on  
8 the proposition that the District's diversion constitutes an  
9 impairment of an existing water right when the streamflow in the  
10 Wenatchee River at the Plain gage falls below the minimums established  
11 in chapter 173-545 WAC.

2 The idea is that Section 2 operates to disallow the District's  
3 diversion, claimed to have commenced in 1911, from being legally  
4 considered senior to the instream flow regime adopted by rulemaking in  
5 1983.

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1 The agency's attempt to regulate the District, therefore, rises or  
2 falls on whether the instream flows of chapter 173-545 WAC constitute  
3 a "water right" as that term is used in Section 2.

4 5. From ancient times water in a running stream has been regarded  
5 as not subject to private ownership. As stated in Mettler v. Ames  
6 Realty Co., 61 Mont. 152, 201Pac. 702, 704(1921):

7 Such water is classed with light and the air in the  
8 atmosphere. It is publici juris or belongs to the  
9 public. A usufructuary right or right to use it  
10 exists, and the corpus of any portion taken from  
11 the stream and reduced to possession is private  
12 property so long only as the possession continues.

13 These principles were borrowed by the common  
14 law from the civil law and in turn were borrowed by  
15 the law of appropriation from the common law.

16 The usufruct or use right is classified as an intangible or  
17 incorporeal interest in real property. Madson v. McNeal, 171 Wash.  
18 669, 675, 19 P.2d97 (1933). Traditionally, it is this proprietary  
19 right of use which has been meant when one speaks of a "water right."

20 6. As a public resource, water is allocated among uses and users  
21 by the exercise of the police power. One expression of this power is  
22 the issuance of permits authorizing the acquisition of proprietary  
23 rights of use through acts of appropriation. See RCW 90.03.010; RCW  
24 90.03.320; Peterson v. Department of Ecology 92 Wn.2d 306, 596 P.2d  
25 285 (1979).

26 Another mode of police power exercise over water is through  
27 legislative rulemaking, such as that employed in establishing  
28 reservations of water for designated types of eventual future use or  
29 in establishing minimum flows or levels in streams and lakes. See RCW

1 90.54.050, RCW 90.22.010.

2 This latter type of allocation process in some ways functions like  
3 a proprietary water right. The date of adoption of instream flows  
4 operates as their date of priority and future appropriations are  
5 subject to them. RCW 90.03.247, RCW 90.03.345. On analysis, however,  
6 this is no more than saying that appropriation permits are conditioned  
7 by the regulations in effect at the time the permits are issued. It  
8 adds nothing to this legal effect to call the regulations themselves  
9 "water rights."

10 7. The attributes of traditional proprietary use rights and of  
11 instream flows differ significantly. The following differences are  
12 noteworthy:

13 a) Under RCW 90.03.010 "any right" to the use of water must be  
14 acquired by appropriation for a beneficial use "in the manner provided  
15 and not otherwise." Instream flows are made "appropriations" by  
16 statutory fiat, RCW 90.03.345, and the environmental values they serve  
17 are statutorily defined as "beneficial" uses. RCW 90.54.020. But,  
18 the method of their creation is not "in the manner provided" by  
19 chapter 90.03 RCW.

20 Traditional water rights are brought into existence by diligent  
21 development, physically applying waters to some useful purpose through  
22 a diversion or, at least, some sort of alteration of the natural state  
23 of things. See In re Alpowa Creek, 129 Wash. 9, 224 Pac. 29 (1924);  
24 Compare with Bevan v. Department of Ecology, PCHB No. 48(1972).  
25 Minimum flows are created in offices by the stroke of a pen without

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1 anything occurring in the outside world.

2       b) A traditional water right relates back in priority to the date  
3 of filing of the original application. RCW 90.03.340. Such a right  
4 is senior in priority to all rights of like kind applied for later.  
5 However, instream flows govern all permits issued after their  
6 adoption. Thus, a traditional appropriation applied for in 1980 if  
7 not approved by permit until 1985 would be subject to all minimum  
8 flows adopted in the interim. The relation-back principle which  
9 applies as between all proprietary rights is inapplicable as between  
10 such rights and instream flows. RCW 90.03.247.

11       c) It is unclear how minimum flows fit into the process of  
12 statutory general water rights adjudications. In such "quiet title"  
13 actions persons claiming the right to divert water are defendants who  
14 must file claims. RCW 90.03.120, RCW 90.03.140. See Department of  
15 Ecology v. Acquavella, 100 Wn.2d 651, 674 P.2d 160 (1983).

16       RCW 90.03.245 provides that rights subject to adjudication  
17 proceedings include "all diversionary and instream water rights." But  
18 no provision is made for the state to file a statement of claim  
19 regarding regulatory instream flows or to prove their validity.  
20 Moreover, there is no suggestion that the failure of an adjudication  
21 decree to confirm such instream flows would have any effect on their  
22 continued vitality. A traditional water right omitted from the decree  
23 would be regarded as extinguished. McCleary v. Department of Game, 91  
24 Wn.2d 647, 591 P.2d 778 (1979).

25       d) Proprietary appropriations are forfeited if "without sufficient

1 cause" they are not used for five or more consecutive years. RCW  
2 90.14.160, RCW 90.14.170, RCW 90.14.180. Minimum flows, set by  
3 regulation, are not, either in law or by their nature, subject to this  
4 requirement of continuous exercise. The "exercise" of an instream  
5 flow is simply the fact of its existence. No actions are required to  
6 keep it alive.

7 8. The statutes authorizing the creation of minimum flows  
8 evidence that the Legislature conceived of these flows as affecting  
9 future uses, not long-established continuing appropriations. RCW  
10 90.22.030 provides that the establishment of such flows "shall in no  
1 way affect existing water and storage rights and the use thereof."  
2 RCW 90.54.900 is to the same effect.

3 9. The legislative history of the 1985 reopening of water right  
4 claims shows an interest in preventing those entities filing late  
5 claims from disrupting the uses of those who had filed earlier. The  
6 claims statute required filing by persons "using or claiming the right  
7 to withdraw or divert" public waters. RCW 90.14.041.  
8 Non-diversionary uses were not covered. Thus, all the earlier filings  
9 were claims to traditional water rights.

10 The reopening of the registration period was prompted by the  
1 predicament of the Kiona Irrigation District in the Yakima Basin. The  
2 Kiona District found itself faced with the relinquishment of any prior  
3 right it might have for failure to file, RCW 90.14.071, but unable to  
4 obtain a permit for a new right because of an administrative closure  
5 of the drainage basin. The legislators believed that the Kiona

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1 District would not be damaged by loss of its priority as against other  
2 diversionary appropriations because it is at the bottom of the basin  
3 and relies principally on irrigation return flows.

4 No instream flows were involved in the Kiona situation and such  
5 flows were not discussed in the enactment of the legislation.

6 10. Section 2 of the 1985 statute is an exception to the entire  
7 statutory scheme of water resource law in this state. It, in effect,  
8 repeals the priority system as to claims subject to its terms. We  
9 believe it should be narrowly construed. See Mead School District v.  
10 Mead Education Association, 85 Wn.2d 140, 530 P.2d 140, 530 P.2d 302  
11 (1975).

12 Accordingly, we conclude that the term "water right" as used in  
13 Section 2 is limited to what we have called traditional water rights  
14 and that instream flows are not included within the term.

15 This conclusion emerges from the understanding that the  
16 registration statute was designed to identify historic uses, not to  
17 eliminate them; that instream flows are a special regulatory creation  
18 differing markedly from the interests in real property traditionally  
19 called water rights; that there is no evidence that the Legislature  
20 intended instream flows to be regarded as superior to long-term  
21 established uses.

22 This conclusion is consistent with the forward looking character  
23 of instream flows delineated by their enabling legislation. Moreover  
24 it preserves the results apparently sought by the Legislature in  
25 considering the Kiona Irrigation District, while minimizing the

1 violence otherwise done to dominant feature of our water law--the  
2 priority principle.

3 11. Accordingly, we hold that the Department's Order (No. DE  
4 85-274) is invalid. This means only that, as against instream flows,  
5 the Department must treat a claim validly filed in 1985 the same as  
6 any other registered claim. We intimate no opinion about whether the  
7 Department might regulate the District's diversion in favor of the  
8 minimum flows of chapter 173-545 WAC on some other basis.

9 In the regulatory setting, DOE must make tentative judgments as to  
10 the validity of unadjudicated claims. See Brownell v. DOE and  
11 Williams, PCHB No. 85-135 (1985), Riddle v. DOE, PCHB NNo. 77-133  
12 (1978). If in the agency's view a claim is illegitimate, regulating  
13 against the claim would be justified on the basis of its probable  
14 non-existence.



1 VI. ORDER

2 IT IS ORDERED that the Department of Ecology's Motion for Summary  
3 Judgment is denied. The Wenatchee-Chiwawa Irrigation District's  
4 Motion for Summary Judgment is granted. Order No. DE 85-274 is  
5 reversed and shall be of no further effect.

6 DONE at Lacey, Washington, this 7th day of April, 1986.

7 POLLUTION CONTROL HEARINGS BOARD

8 

9 WICK DUFFORD, Lawyer Member

10   
11 GAYLE BOTHROCK, Vice Chairman

12  4/7/86  
13 LAWRENCE J. FAULK, Chairman